Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Misuse of Internet Protocol (IP) Captioned Telephone Service	)	CG Docket No. 13-24
	)	
	)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	)	CG Docket No. 03-123
	)	
	)	

INITIAL COMMENTS OF IDT TELECOM, INC.

IDT Telecom, Inc.

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I. INTRODUCTION

IDT Telecom, Inc. ("IDT") provides intrastate, interstate and international telecommunications services, interconnected VOIP services and non-interconnected VOIP services. IDT files a FCC Form 499-A ("Form") and its filing contains revenue on Line 514(b) of the Form. Support for the Interstate TRS Fund ("Fund") is calculated based on revenue reported by telecommunications, interconnected VOIP and non-interconnected VOIP providers on 514(b) of the Form. Line 514(b) contains interstate and international revenue; it does not contain intrastate revenue. Accordingly, IDT contributes to the Fund based on its interstate and international revenue as reported on Line 514(b) of the Form.

In its Further Notice of Proposed Rulemaking,[1] the Commission has proposed to replace the current temporary funding contribution methodology for IP CTS[2] with a permanent methodology that would expand the contribution base to include intrastate revenue.[3] IDT Supports the Commission's efforts to eliminate the temporary methodology for IP CTS with a more permanent, stable and lawful methodology. IDT believes both proposed contribution methodologies are lawful but recommends adoption of the single-factor methodology. IDT also believes the Commission may implement either proposed methodology without first sending the issue to the Federal-State Joint Board on Separations. Because we assert this to be the case, we believe that the Commission has raised additional questions which are moot, but which we nevertheless address should the Commission disagree with IDT's assertion. But regardless of whether the Commission chooses to implement a new IP CTS Fund or chooses to transfer management of and compensation for intrastate IP CTS to the states, it should implement contribution reform immediately. IDT also asserts that NARUC's Resolution regarding this matter fails to present an argument based on sound policy and is not ground in the law and should be dismissed. And finally, IDT also asserts that Commissioner O'Rielly's concerns do not present a bar to the implementation of a separate IP CTS Fund.

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[1] *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 13-24; CC Docket No. 03-123, Report and Order and Further Notice of Proposed Rulemaking, FCC 18-79 (June 8, 2018) ("FNPRM").

[2] *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities; Internet-based Captioned Telephone Service*, CG Docket No. 03-123, Declaratory Ruling, FCC 06-182 at ¶ 5 (January 11, 2007)("TRS Declaratory Ruling").

[3] FNPRM at ¶ 102.

II. DISCUSSION

A. IDT SUPPORTS THE COMMISSION'S EFFORTS TO ELIMINATE THE TEMPORARY FUNDING METHODOLOGY FOR IP CTS WITH A MORE PERMANENT, STABLE AND LAWFUL METHODOLOGY

In its Further Notice of Proposed Rulemaking,[4] the Commission has proposed to replace the current temporary funding contribution methodology for IP CTS[5] with a permanent methodology that would expand the contribution base to include intrastate revenue. In doing so, the Commission noted that "[S]uch expansion would ensure that a reasonable share of support for IP CTS is obtained from those voice service providers with mostly intrastate traffic."[6] The Commission "seek[s] comment on these beliefs, and on any other benefits or costs that would result from expanding the contribution base for IP CTS to include intrastate voice service revenues."[7] As discussed further below, IDT supports the Commission's decision to eliminate the temporary funding methodology for IP CTS and to replace it with the proposed single contribution factor methodology.

IDT concurs with the Commission's belief that its decision to expand the IP CTS to include intrastate revenue will ensure that intrastate providers support the provision of IP CTS.[8] It is beyond question that IP CTS allows calls to be placed between a calling and called party physically located in the same state. It is equally beyond question that such calls are made and that relay service providers are compensated for such calls: the Commission has documented that traditional CTS minutes are approximately 76% intrastate[9] and we see no reason to believe that the jurisdiction of traditional and IP CTS calls differ in any meaningful respect. Moreover, the Commission possesses evidence - specifically, call records submitted by IP CTS providers as proof required for payment[10] - which further supports the Commission's contention that IP CTS calls between parties located within the same state are made and compensated from the Interstate TRS Fund ("the Fund).

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[4] *See generally,* FNPRM ¶¶ 101-116.

[5] *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities; Internet-based Captioned Telephone Service*, CG Docket No. 03-123, Declaratory Ruling, FCC 06-182 at ¶ 5 (January 11, 2007)("TRS Declaratory Ruling").

[6] *Id.* at ¶ 102.

[7] *Id.*

[8] *Id.*

[9] *Id. at* ¶ 105.

[10] 47 CFR § 64.604(c)(5)(iii)(D)(*2*)(*v*)-(*vi*).

The Commission has also indicated that if it were to expand the IP CTS contribution base to include intrastate revenue, that 60% of the contribution base would be intrastate revenue.[11] Since this makes clear that intrastate providers would contribute to the proposed IP CTS Fund, the only remaining aspect of the Commission's inquiry, then, is whether the proposed methodology ensures that intrastate providers would remit a "reasonable" share of support for IP CTS. The data included in the FNPRM indicates that under the proposed methodology intrastate providers would pay *less* than the proportionate share of costs incurred by intrastate IP CTS calls. And while IDT is concerned that the proposed methodology would continue to allow intrastate providers to avoid paying their full share, we conclude that the Commission's approach, while far from perfect, is reasonable and that a reasonable approach is a lawful one, particularly given the Commission's statutory authority to "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States."[12]

The benefits of extending the contribution base to intrastate revenue to support intrastate IP CTS are great and many. First, the expansion to include intrastate revenue would allow the FCC to implement a lawful, permanent contribution methodology consistent with Section 225.[13] Second, it would provide considerable stability to the Fund, which in its present state has seen its contribution base diminish greatly over the last decade – from approximately 81 billion for the 2004-2005 Year to less than 54 billion for the 2018-2019 Year.[14] Third, it allows for interstate and international service providers to be relieved of the sole burden of supporting intrastate IP CTS. And finally, it allows for the customers of interstate and international providers to be relieved of the burden indirectly placed upon them.

IDT believes that the costs that would result from expanding the contribution base for IP CTS to include intrastate voice service revenues are – at most – some minor administrative costs which would have no material impact on the 1.5B Fund(s). We note (and discuss further, below) that NARUC issued a resolution opposing such an expansion on the basis that it would lead to greater costs.[15] However, there is no support for a claim of increased costs as a result of creating

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[11] FNPRM at ¶ 105.

[12] 47 U.S.C. §225(b)(1).

[13] It is the position of IDT that – regardless of the expansive authority granted to the Commission under Section 225, a contribution methodology that knowingly compensates calls from calling and called parties located within the same state yet declines to include intrastate revenue within its funding base is unjust and unreasonable under Section 201.

[14] TRS Declaratory Ruling at ¶ 5.

[15] "TC-4 Resolution Opposing Proposed Expansion of the IP CTS Contribution Base," (July 18, 2018); https://www.naruc.org/resolutions-index/2018-summer-policy-summit-resolutions/ (last viewed September 17, 2018)("NARUC Resolution").

a separate IP CTS Fund and including intrastate revenue within its base and, absence evidence in support of such a claim, the claim should be dismissed. Moreover, the Commission is concurrently undertaking efforts to reduce IP CTS per minute costs; fraud and otherwise unnecessary use of IP CTS – all of which represent significant IP CTS cost factors. IDT believes that the Commission will not allow contribution reform to take the place of these vital reforms and that the Commission will certainly continue its relentless efforts to curb IP CTS costs concurrent with contribution methodology reform. Indeed, this FNPRM is proof of the Commission's commitment to these cost-cutting measures.

B. IDT BELIEVES BOTH PROPOSED CONTRIBUTION METHODOLOGIES ARE LAWFUL BUT RECOMMENDS ADOPTION OF THE SINGLE-FACTOR METHODOLOGY

The Commission has proposed to effectively establish a "separate contribution factor or factors [that] would then be developed for the purpose of determining the contributions needed from each TRS Fund contributor for support of IP CTS."[16] The Commission then proposes two approaches under which this could be accomplished:

> Under one possible approach, the TRS Fund administrator could compute a single contribution factor for IP CTS, which would be applied in the same manner to all end-user revenues, both interstate and intrastate, in effect treating the IP CTS revenue requirement as a single pool to which all TRS Fund contributors would pay the same percentage of their total end-user revenues.[17]

The Commission then seeks comment on whether this single factor approach is reasonable, equitable to all providers, and consistent with the requirements of section 225. For the reasons stated below, IDT asserts that a methodology that results in a single IP CTS contribution factor is reasonable, equitable and consistent with section 225. Furthermore, IDT asserts that this is the preferred near- and possibly long-term methodology as well.

The Commission also proposes an alternative plan, which would result in multiple IP CTS contribution factors. The Commission states:

> Under an alternative plan, the IP CTS revenue requirement would be divided into interstate and intrastate portions, based on an estimate of the proportion of IP CTS costs and minutes that are interstate and intrastate, respectively. Separate contribution factors would then be determined for (1) interstate IP CTS, by dividing the interstate IP CTS revenue requirement by total interstate end-user revenues of all TRS contributors, and (2) intrastate IP CTS, by dividing the intrastate IP CTS revenue requirement by total

[16] FNPRM at ¶ 105.

[17] *Id.* at ¶ 106.

intrastate end-user revenues of all TRS contributors (minus intrastate revenues attributable to states that do not self-administer IP CTS). Under this alternative approach, the contribution factors for interstate and intrastate IP CTS, respectively, would not be the same because the IP CTS revenue requirement would be allocated between the separate jurisdictions based on the percentage of *IP CTS minutes and provider costs* attributed to each jurisdiction, while the contribution base would be allocated based on the percentage of *end-user revenues* allocated to each jurisdiction.[18]

IDT believes this alternate, multiple factor plan is permissible, although we have reservations regarding its implementation and, due to those reservations, we believe the first, single-factor plan proposed by the Commission remains the preferred approach for immediate implementation as well as for the long term. Our reservations regarding the multiple factor approach are discussed below.

The Commission notes that "Implementation of this second alternative approach would be more complicated, and might involve some additional delay, because it would require the TRS Fund administrator (or the Commission) to estimate the proportions of IP CTS minutes and provider costs that are interstate and intrastate."[19] As an initial matter, IDT believes the Commission's concerns are unwarranted and we discuss this in greater detail below. However, should the Commission disagree with IDT's understanding of the appropriate role regarding jurisdictional separations, IDT still has concerns about the second approach. Specifically, IDT believes the compensation of IP CTS and all relay services is at a crisis point – not only for the Commission, which is faced with a plummeting contribution base[20] and exploding contribution factor,[21] but for contributors such as IDT, who have seen their TRS Fund contributions explode to such a degree that it is harming day-to-day business operations. Quite simply, any solution which further delays reform is undesirable unless the Commission is willing to implement immediate interim relief in accordance with its first proposed approach, for example, while it further examines a more long-term solution, such as the multiple factor plan.

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[18] *Id.* at ¶ 107 (Footnotes omitted).

[19] *Id.* at ¶ 108.

[20] *"Interstate Telecommunications Relay Service Fund Payment Formula and Fund Size," Rolka Loube Associates LLC, Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 13-24; CC Docket No. 03-123 ("Rolka TRS Fund Report") at p. 11.

[21] *See generally,* http://www.rolkaloube.com/trs/trs-contributors/ (Last Viewed September 17, 2018).

C. THE COMMISSION MAY IMPLEMENT EITHER PROPOSED METHODOLOGY WITHOUT FIRST SENDING THE ISSUE TO THE FEDERAL-STATE JOINT BOARD ON SEPARATIONS

The Commission asks commenters whether "they agree that ... legislative sources provide ample statutory authority for the Commission to address the support for intrastate IP CTS calls."[22] IDT agrees for the reasons stated below.

The Commission has broad authority under 47 U.S.C. §225 to regulate the provision of and compensation for intrastate relay services. 47 U.S.C. §225(b)(1) states:

> [T]the Commission's shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

And 47 U.S.C. §225(b)(2) reads in full:

> Use of general authority and remedies
>
> For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

We assert that these provisions by their plain language unequivocally authorize the Commission to regulate intrastate relay services.

If the Commission may regulate intrastate relay services, by extension, the Commission must have the authority under 47 U.S.C. §225 to extend the TRS Fund contribution base to include intrastate revenue: to argue that the Commission can regulate intrastate services without the authority to financially support such services would be illogical. Therefore, IDT asserts that the Commission has the authority to regulate both the provision of and compensation for intrastate relay services.

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[22] FNPRM at ¶ 109.

As well as the aforementioned explicit provisions, 47 U.S.C. §225 implicitly allows for the FCC to regulate the provision of and recovery for intrastate relay services. This implicit authority is established by the fact that there is nothing in the statute which compels the states (or the Commission) to establish state programs to administer intrastate relay services. To be clear: the establishment of a state program to manage the provision of and recovery for one or more intrastate relay services is voluntary. 47 U.S.C. §225(f)(1) refers to states "desiring" to establish a state program under the statute. 47 U.S.C. §225 does not *compel* states to establish a state program. That all states have chosen to establish programs to manage the provision of and recovery for certain intrastate relay service is a demonstration of the states "desire" to do so. That states have established programs to administer intrastate relay services is simply a matter of fact: it is not a matter compelled by legislation.

With this understanding, we must conclude that a state's failure to establish a program for the oversight of and compensation for intrastate IP CTS is a demonstration of its desire to not establish a program. And in the absence of state action to establish a program for the oversight of and compensation for intrastate IP CTS, the obligation falls to the Commission, consistent with its obligation to ensure that interstate and intrastate relay services are available to the extent possible and in an efficient manner, to establish such a program and to implement regulations that oversee the management of the service(s). Which the FCC has done.

Furthermore, there is nothing in the statute which prevents *some* intrastate relay services from being administered *via* a state program while *other* intrastate services are administered by the FCC. Indeed, the Commission has, by its own admission, administered the provision of and compensation for intrastate IP CTS (as well as VRS and IP Relay) and if it does not have the authority to administer and provide compensation for IP-based relay service calls that originate and terminate within the same state then it has been in violation of Section 225 for the past 18 years. Thus, the Commission can continue to administer and compensate intrastate and interstate IP CTS while state programs can continue to administer and compensate the intrastate components of services presently under their authority if the Commission deems this approach to be the most efficient manner to make intrastate and interstate relay services available.

Given this authority, the Commission is presented with two choices: delegate to the states the authority to manage and fund intrastate IP CTS or implement permanent rules and policies that ensure the Commission continues to manage intrastate IP CTS while including intrastate revenue within the contribution base for intrastate IP CTS. While IDT believes the former option *may* be a long-term goal (we discuss this more below), we also believe that for the immediate future, the Commission must remain the administrator for intrastate IP CTS service and that it should revise the contribution methodology to reflect the simple fact that the

Commission compensates providers of IP CTS calls that originate and terminate within the same state but does not (presently) use intrastate revenue as part of the IP CTS contribution base.

What has caused some concern amongst the Commission and (as discussed below) NARUC regarding the Commission's proposal to fund IP CTS from carriers' intrastate revenue involves the apportionment of intrastate costs. The source of this concern appears is 47 U.S.C. §225(d)(3) which reads:

> (3) JURISDICTIONAL SEPARATION OF COSTS
>
> (A) In general
>
> Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.
>
> (B) Recovering costs
>
> Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f), a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

We note, first, that the statute does not compel sending the issue to the Federal-State Joint Board: it directs the Commission to proscribe regulations governing separation of costs. Moreover, as the Commission noted in the FNPRM, since the TRS Fund's inception, the Commission has *never* found it necessary to convene a joint board to address separation of costs and has relied on existing rules.[23] For the reasons stated below, we conclude that the Commission

[23] *See*, FNPRM FN 305. "However, in the initial 1993 decision establishing the TRS Fund, the Commission determined that the existing separations rules were adequate to separate TRS provider costs and that, accordingly, it would not be necessary to convene such a board. *1993 TRS Order*, 8 FCC Rcd at 5305, para. 30 & n.30. We also believe it is significant that the scheme established by section 225 for joint federal and state administration of TRS is separate—and significantly different from—the Communications Act's traditional division of jurisdictional responsibilities over wireline telecommunications service. *Compare* 47 U.S.C. § 225(f) (providing for Commission review and certification of programs established by states "for implementing intrastate telecommunications relay services" subject to regulations prescribed by the Commission) *with* 47 U.S.C. § 152(b) (providing that "except as provided in sections 223 through 227 of this title . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to [] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier")."

need not send this issue to the Joint Board – and that even the reasoning for why the Commission *might* need to is actually mistaken.

The reason the Commission and NARUC have expressed concern that the issue of cost recovery must be based on jurisdictional separations is based on a mis-reading of 47 U.S.C. §225(d)(3)(B). Subsection (B) refers to cost recovery "from subscribers." Common carrier contributors to the existing and/or newly proposed Fund *are not* "subscribers." Therefore, this subsection does not apply to cost recovery by the Commission from common carrier contributors to the Fund(s). Rather, it applies to the recovery of costs for relay services imposed by those common carrier contributors upon end-user subscribers.[24] Because this proceeding is about how the Commission should pass through the costs of relay services to common carrier contributors to the Fund(s) and *not* about how these common carrier contributors can pass along their costs to end-users, this language is immaterial when analyzing the Commission's statutory obligations (or lack thereof) in how it chooses to support the Fund(s) from the contributions of common carriers.

To restate what many have failed to recognize yet is obvious upon a review of the plain meaning of the statute:[25] the statutory requirement for jurisdictional separations of recovered costs for relay services applies to the recovery of costs from the end-user subscribers of common-carrier contributors to the Fund(s) and *not* to the recovery of costs by the Commission from common carrier contributors to the Fund(s) – the latter of which is the issue presented in the FNPRM. The language in 47 U.S.C. §225(d)(3)(B) demonstrates Congress's concern that common carrier contributors recover their costs from their end-user subscribers fairly, *i.e.*, that contributors would not recover all their costs (interstate and intrastate) from subscribers of only

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[24] While not explicitly defined in the TRS statute, "subscriber" is defined in 47 CFR § 64.1100 as:

The term subscriber is any one of the following:
(1) The party identified in the account records of a common carrier as responsible for payment of the telephone bill;
(2) Any adult person authorized by such party to change telecommunications services or to charge services to the account; or
(3) Any person contractually or otherwise lawfully authorized to represent such party.

None of these descriptions can reasonably be applied to the common carrier contributors to the Fund(s).

[25] IDT realizes that this position may strike some as contrary to positions we have previously taken and possibly even to positions and concerns previously expressed by the Commission. But that does not address the simple fact that our interpretation is correct and, more importantly, the Commission's authority to implement rules is constrained in that it cannot replace the clear, unambiguous intent of Congress with rules that directly contradict Congressional intent. *See, e.g., In re Old Fashioned Enterprises, Inc.*, 236 F.3d 422, 425(8th Cir. 2001)("Although substantial deference is due an agency's interpretation of its regulations, no deference is due if the interpretation is contrary to the regulation's plain meaning."); *Delaware Division of Health and Social Services v. United States Department of Health and Human Services*, 664 F.Supp. 1104 (D. Del. 1987)(Where "the regulations unreasonably supersede" the plain meaning of the statute, the "attempted revision of the statutory language is not only unreasonable; it is arbitrary and capricious" and "must be overturned.")

one jurisdiction and/or some other discriminatory practice, *i.e.*, recovering all costs from residential subscribers and not business subscribers. Making this issue even more moot (if "more moot" is even possible...) the Commission does not allow common carrier Fund contributors to pass through an identifiable federal relay service fund surcharge to their end-user subscribers. And while we disagree with the Commission on this position,[26] we assert that because the recovery from end-user subscribers of federal Fund relay costs incurred by common carrier contributors is not permissible, it cannot be a bar to the Commission's proposals or even a consideration in this proceeding. Ultimately, for the reasons stated above, any reliance on 47 U.S.C. §225(d)(3) to support the contention that this matter must *first* be sent to a Joint Board because the statute compels joint separation of costs paid by common carrier contributors to the Fund(s) must fail. Moreover, *any* claim that the issue of cost recovery of federal Fund(s) relay service expenses from subscribers should be sent to the Joint Board and/or needs to be addressed in this proceeding must fail because the Commission does not presently allow for cost recovery and has not presented the issue in this proceeding. As a result, there is no compelling need to address it within the context of this proceeding.

D. THE COMMISSION RAISES ADDITIONAL QUESTIONS WHICH IDT ASSERTS ARE MOOT BUT WHICH WE ADDRESS SHOULD THE COMMISSION DISAGREE WITH IDT'S ASSERTION

The Commission further seeks comment on whether:

> [S]uch a calculation [jurisdictional separations] is necessary to ensure that the burden of TRS Fund contributions is distributed equitably among voice service providers and consistently with section 225. If so, how should such separation of IP CTS costs and minutes be determined? Are the current separations rules adequate to separate intrastate and interstate IP CTS costs, or would it be necessary to refer this issue to the Federal-State Joint Board on Separations? We note that in 2003, the Commission expected that TRS providers would be able to make jurisdictional determinations regarding the separation of CTS minutes handled through state programs. Further, in submissions to the TRS Fund administrator accompanying requests for compensation, some IP CTS providers currently report both the originating and terminating telephone numbers for almost all their calls, suggesting that such jurisdictional allocation of IP CTS minutes is feasible. To the extent that some IP CTS calls cannot currently be identified as either intra- or interstate, should the Commission permit a percentage classification based on traffic studies? Alternatively, should the Commission establish a default proxy

[26] IDT has commented before this Commission that a line federal TRS Fund recovery line item is permissible and should be implemented and we remain committed to that position.

allocation, and if so, what should the proxy allocation be? We also seek comment on any other implementation alternatives that the Commission should consider.[27]

So as to ensure absolute clarity, as stated above, Section 225 does not compel that the contribution to the Fund(s) imposed upon common carrier contributors be distributed equitably: it requires that costs caused by relay services be recovered from end-user "subscribers" in a manner generally consistent with jurisdictional separations. Should the Commission disagree with this position, for the reasons stated above and in the FNPRM as well (with which we agree) ("We note that IP CTS providers' compensation would not be affected by which of the two alternatives discussed above is selected, unless we were to set different compensation rates for interstate and intrastate IP CTS minutes. We see no need to do so."),[28] IDT does not believe the matter need be sent to the Joint Board.

Indeed, particularly under the Commission's single-factor plan, there is nothing inherently jurisdictional about the costs being recovered in the proposed IP CTS Fund: the costs *are* the minutes and *all* minutes are to be compensated at the same rate regardless of jurisdiction. Moreover, the calls are identified by jurisdiction in accordance with 47 CFR § 64.604(c)(5)(iii)(D)(*2*)(*v*)-(*vi*). There is not one rate for intrastate calls and another for interstate and a third for international.[29] There never has been jurisdiction-based rates for IP CTS and no one has proposed that there should be. So what costs, exactly, would a Joint Board consider? Would it propose that, perhaps, different jurisdictional calls should be compensated at different rates? If so, IDT would assert that the Commission has the authority, under the "most efficient manner" clause to decline to compel different compensation rates depending on a compensable call's jurisdiction. Moreover, IDT notes that neither NARUC nor any other party has taken this position regarding any other service compensable under the Fund and to do so in this proceeding would be inappropriate. Any commenter that disagrees with IDT must demonstrate that the existing rules are inadequate and that it would be an unreasonable use of the Commission's discretion to decline sending this issue to the Federal-State Joint Board. IDT believes that this sets a high bar.

The only costs that might possibly be subject to a separations of costs analysis are the so-called Non-Provider payments.[30] With the exception of Payment Reserve, which we discuss below, these costs represent less than 2% of the overall Fund budget. While we disagree that

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[27] FNPRM at ¶ 108 (Internal footnotes omitted.)

[28] FNPRM at FN 304.

[29] Despite the Commission's insistence in using "interstate" to include "interstate" and "international," International is, as a matter of law and fact, its own, separate jurisdiction and should the Commission engage in any separation of costs, the Commission *must* account for this distinction.

[30] *See,* Rolka TRS Fund Report") at Exhibit 2.

the inclusion of the term "generally" applies to cost recovery from common carrier contributors to the Fund, we assert that if it does, it allows the Commission to implement a cost recovery methodology that is not perfect down to the final penny. And we further assert that the Commission could use its "general" authority to apportion the Non-Provider payments between Funds and/or jurisdictions according to a reasonable methodology of its own choosing, e.g., minutes of use, associated costs, etc.

Regarding the Commission's statement that "some providers report only the registered user's number for most of their IP CTS calls,"[31] we assert that this issue needs to be addressed whether or not jurisdictional separations applies. The Commission states, "Our rules *generally* require TRS providers to submit the originating and terminating telephone numbers for TRS calls for which compensation is requested from the TRS Fund. 47 CFR § 64.604(c)(5)(iii)(D)(*2*)(*v*)-(*vi*). However, some providers report only the registered user's number for most of their IP CTS calls."[32] (emphasis ours) The Commission's analysis of its rules is incorrect. 47 CFR § 64.604 is titled "*Mandatory Minimum* Standards" (emphasis ours) and 47 CFR § 64.604(c)(5)(iii)(D)(*2*) is titled "Call data *required* from all TRS providers" (emphasis ours.) "Mandatory" and "Minimum" and "Required" are not ambiguous terms and cannot be diminished by the inclusion of "generally" in 47 U.S.C. §225(d)(3), particularly as "generally" refers to the separation of costs recovered from end user subscribers and not to the data relay service providers need to provide in order to be compensated from the Fund.[33] Additionally, we note that § 64.604(c)(5)(iii)(D)(*5*) requires an Officer to state under penalty of perjury that "all requested information has been provided." It is not evident how an Officer can fail to provide the requested information and yet sign this statement. Likewise, it is not evident how the Commission can compensate IP CTS providers when mandatory, minimum and required information is not provided. Ultimately, 47 CFR § 64.604(c)(5)(iii)(D)(*2*)(*v*)-(*vi*) requires the originating and terminating phone number (or IP address, as applicable) and in the absence of such information, a call is not compensable. IDT urges the Commission that it must cease compensating calls when the required data is not provided, thereby making this question moot.

Further, the Commission states, "we believe that when both parties to an IP CTS call are located within the same state, the call should be classified as an intrastate call under section 225.

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[31] FNPRM at FN 307.

[32] *Id.*

[33] IDT acknowledges that the Commission does have flexibility to ensure that services are made available in the most efficient manner but, absent an explanation as to how relay service provider's failure to provide mandatory minimum information results in the efficient provision of services. Indeed, as evidenced by the fact that this issue has been raised in this proceeding and presents a concern regarding the management and funding of the service, the failure to provide the mandatory minimum information suggests that it results in inefficiency.

We seek comment on these views."[34] IDT supports the general position that a call that originates and terminates within the same state is intrastate. Indeed, if the Commission intends to transfer management of and compensation for intrastate IP CTS to the states, this position must be the foundation of such action. But we also assert that reaching such a finding is unnecessary if the Commission chooses to maintain the management of and compensation for all IP CTS calls under its authority to make IP CTS available "in the most efficient manner:"[35] the Commission can simply determine that it is entrusted with the management of and compensation for all IP CTS calls and that it accordingly recovers the costs for those calls from all jurisdictions. Determining the jurisdiction of calls only becomes an issue to be addressed if/when the Commission chooses to allow or require states to oversee the management of intrastate IP CTS. And, as IDT argues, such allowance should not be done at this time.

E. REGARDLESS OF WHETHER THE COMMISSION CHOOSES TO IMPLEMENT A NEW IP CTS FUND OR IT TRANSFERS MANAGEMENT OF AND COMPENSATION FOR INTRASTATE IP CTS TO THE STATES, IT SHOULD IMPLEMENT CONTRIBUTION REFORM IMMEDIATELY

IDT asserts that the statutory obligation that the Commission regulate IP CTS "in the most efficient manner"[36] is an important, broad delegation of power which the Commission can use as sword, shield or both. For example, the Commission could declare that, given the states' expertise in managing other intrastate relay services, it would be most efficient for the states to manage the provision of and compensation for intrastate IP CTS and thereby make it mandatory that all state relay service agencies, if they are to be certified by the Commission, agree to do so. Or, to the contrary, the Commission could conclude that requiring all or some states to manage and compensate intrastate IP CTS is too inefficient, thereby concluding that the Commission should maintain the *status quo*. IDT addresses both arguments below.

As raised in the NPRM, particularly in Part V, Section C ("State Role in the Administration of IP CTS"), there are many concerns that would need to be addressed before the management of and compensation for intrastate IP CTS could be transferred to the states. And it is near-certain that it will take years to address and resolve these concerns. These concerns go to the core of the Commission's obligation to "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States."[37] Additionally, as IDT has noted in prior filings, if states contract with only one IP CTS provider (it is IDT's understanding that states

[34] FNPRM at ¶ 110.

[35] 47 U.S.C. §225(b)(1).

[36] *Id.*

[37] 47 U.S.C. §225(b)(1).

generally contract with one provider of a particular relay service), all other IP CTS providers could be shut out of the state and possibly out of business entirely. Also, certain providers (particularly smaller providers with higher costs) might decline to operate within a state if the state is allowed to set a rate which is not deemed to be fully compensatory. Most grievously, if states conclude that the burden of regulating IP CTS is too great or is not permissible under state law, states could simply choose to exit the relay service space entirely,[38] thereby compelling the Commission to not only regulate intrastate IP CTS in a patchwork quilt of states, but to take on the additional responsibility of regulating (and compensating) the non-IP intrastate relay services that had theretofore been managed/compensated by the state relay service regulator. Ultimately, IDT does not take a position on whether states should be required or allowed to manage and compensate intrastate IP CTS. However, we very strongly take the position that if the Commission were to transfer authority, it should not allow the time necessary for an orderly transition to delay the immediate relief sought by IDT. We are particularly concerned that some commenters whose goals may be to delay change to the funding methodology proposed by the Commission may support this argument simply as a means to delay the change wisely proposed by the Commission and desperately needed by the industry and the community of relay service users.

F. A DAY LATE AND A DOLLAR SHORT: NARUC'S RESOLUTION FAILS TO RECOGNIZE THE NEED FOR CONTRIBUTION REFORM, FAILS TO PRESENT AN ARGUMENT BASED ON SOUND POLICY AND IS NOT GROUND IN THE LAW. ACCORDINGLY, IT SHOULD BE DISMISSED

IDT is also aware of a "Resolution Opposing Proposed Expansion of the IP CTS Contribution Base" issued by NARUC. In the Resolution, NARUC states, in part, "NARUC does not support redirecting more money into the current federal TRS fund at this time through a single combined interstate and intrastate contributions factor for IP-CTS, as these modifications do nothing to minimize the inefficient and/or inappropriate use of the program and would therefore be premature...."[39] Frankly, IDT is puzzled by the Resolution and this claim in particular, as it is a red herring. The Commission has not proposed to "redirect *more* money" (our emphasis): the Commission has proposed to collect the *same amount of money* to support IP CTS. The Commission has simply proposed to modify the source of the funding from two sources – interstate and international end-user revenue - to three sources – intrastate, interstate and international end-user revenue. The Commission's proposal will not add one extra penny "more" to the budget. And, in fact, the Commission has proposed several common-sense approaches to

[38] As IDT has noted in prior filings, states are not required under Section 225 to manage intrastate relay services of any kind – TDM or IP. The statutory language refers to states "desiring" to establish relay service programs: states are not compelled to do so under federal law.

[39] NARUC Resolution at ¶ 13.

reduce the cost of IP CTS. Thus, the argument that the Commission should decline to act because action results in increased costs is, quite simply, wrong and should be rejected accordingly.

NARUC's secondary position (which can be seen in two parts which we address separately below) is similarly unpersuasive. This position boils down basically to a turf war: NARUC doesn't want the Commission regulating what they perceive to be an intrastate service and NARUC doesn't want the Commission using intrastate revenue to support what they perceive to be an intrastate service. This position is baffling. The FCC has regulated all IP CTS service (including calls placed between two parties located within the same state) since the service's inception. NARUC has never (to the best of IDT knowledge) opposed this and, in fact, when the Commission previously proposed turning the regulation of intrastate IP CTS over to the states, the response was underwhelming and oppositional. Moreover, the FCC's authority to regulate IP CTS regardless of the location of the calling and called parties is well-established in 47 USC § 225. Indeed, it appears that NARUC's position suffers the same fatal flaw as the concerns raised by Chairman O'Rielly: it views regulation of telecommunications relay services under a traditional Title II analysis rather than under an analysis grounded in the authority granted to the Commission under 47 USC § 225. Under 47 USC § 225, the Commission has the same "authority, power, and functions" to regulate intrastate relay services as it does interstate relay services and it may use that authority, power and function in the "most efficient manner possible." IDT asserts that this expansive grant extends to cost recovery as well.

But NARUC doesn't want the Commission using intrastate revenue to support what they perceive to be an intrastate service without first undertaking a jurisdictional separations analysis.[40] This is perhaps the most puzzling aspect of the Resolution. NARUC takes no issue with the fact that under the present contribution methodology, interstate and international service providers support intrastate IP CTS without any accounting for the jurisdictional separations which NARUC deems of great importance. Further, NARUC takes no issue with the fact that international service providers support a substantial portion of IP CTS (and IP-based relay services in general) when, in fact, international IP CTS (and virtually all relay services) represent virtually no portion of the IP CTS budget in particular and the TRS Fund in general.[41] And NARUC expresses no concern that this proceeding still fails to address the ongoing

[40] It is unclear whether NARUC takes a position on the use of intrastate revenue to fund the NANP and LNP Funds but the silence on these issues indicates, at best, a lack of uniformity amongst the organization's positions.

[41] To be clear, provided that it imposes an immediate, "temporary" solution, IDT would not oppose Commission efforts to undertake a jurisdictional separations of IP CTS and to create separate factors for cost recovery of each jurisdiction of calls. Indeed, such an analysis would greatly benefit IDT, which has a disproportionate amount of international revenue while there is virtually no international IP CTS. However, we believe that what a carrier can argue the Commission should do and what it is required to do under the law are not always the same. This is a lesson NARUC does not seem to have learned.

Commission management of and compensation for intrastate VRS and IP Relay from the interstate and international jurisdictions.

NARUC proposes that "any necessary contribution restructure for IP CTS occur only after measures to minimize inefficient and/or inappropriate use of the program are implemented and appropriate costs are determined...."[42] So when, exactly, would this take place? One year? Two? Three? More? NARUC's Resolution is devoid of any sense of urgency – a state we are pleased the Commission does not share. In its Resolution, NARUC seems to assume that reducing cost and fraud will somehow magically address all funding concerns although they provide no documentation to support the impact that attention to these issues will have on IP CTS or the TRS Fund budget as a whole. And even if reducing costs and fraud brings the IP CTS budget under control (whatever "under control" means, exactly), the outcome would still fail to address the fact that the Commission only intended for its decision to fund intrastate IP CTS from the interstate and international jurisdictions on a temporary basis and that this temporary basis has been in place for over a decade – an extended period of time which IDT asserts is unreasonable and unlawful. Additionally, even the most optimal outcome of rate reduction and fraud prevention to reduce costs would still fail to address the steeply declining TRS Fund contribution base. In sum, acting in conformance with NARUC's resolution would do nothing to address the concerns regarding jurisdictional separations which are present in the present contribution methodology and would do nothing to strengthen and increase the existing contribution base.

G. COMMISSIONER O'RIELLY'S CONCERNS DO NOT PRESENT A BAR TO THE IMPLEMENTATION OF A SEPARATE IP CTS FUND

Commissioner O'Rielly raises two points in his Statement attached to the FNPRM. IDT recognizes Commissioner O'Rielly's concerns and we appreciate the thoughtfulness of his inquiry, however, we do not believe the concerns raised by Commissioner O'Rielly preclude the proposed and desired outcome: to expand the TRS Fund contribution base to create a separate IP CTS fund whose contribution base would include intrastate revenue. We address each point below.

Commissioner O'Rielly states, "The portion of the item that continues to give me enormous angst, however, is the legal authority provided for expanding the base of TRS contributors. Anchored in sound policy and in the law, I have pressed the Commission to declare that broadband, VoIP, and text messaging are interstate, information services. IP CTS, in my view, would fall into this same category."[43] Respectfully, IDT does not believe that IP CTS is an interstate, information service: we assert that IP CTS is a Telecommunications Relay Service. It

[42] NARUC Resolution at ¶ 17.

[43] "STATEMENT OF COMMISSIONER MICHAEL O'RIELLY APPROVING IN PART AND CONCURRING IN PART." FNPRM (O'Rielly Statement").

has always been[44] thus and it should remain so. The debate and controversy over telecommunications services and information services has occupied the Commission's time and resources for decades and we see no need to further complicate the debate. TRS is a term defined under 47 USC Sec. 225(a)(3) and IP CTS has been determined by the Commission to be a TRS.[45] There is no need to create a controversy where none has previously existed. As for the jurisdiction of particular IP CTS calls, while IDT agrees that an IP CTS call that originates from a calling party and terminates to a called party located within the same state would be jurisdictionally intrastate under a traditional analysis, we believe that the jurisdiction of the call is not necessarily relevant. IDT asserts that the Commission can conclude that consumers may place calls regardless of the physical location of the calling and called parties and, thus, secure compensation from revenue generated by all jurisdictions without concluding whether a compensable call is one jurisdiction or another.

Commissioner O'Rielly goes on to state "Relying on a strained interpretation of the statutory term 'generally' in order to assess intrastate providers is not necessary and others may attempt to use it to undermine unrelated Commission proceedings."[46] IDT does not see the strain placed on the term "generally." 47 U.S.C. §225 is rather clear and expansive:

> [T]the Commission's shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.[47]
>
> ***
>
> For the purposes of administering and enforcing the provisions of this section and the regulations promulgated thereunder, the Commission shall have the same authority, power and functions with respect to common carriers engaged in intrastate communication as ... [it] has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication."[48]

Rather, we see the strain placed on "generally" when it was first used and then used again and again to support a "temporary" funding mechanism for IP-based relay services that declined to use intrastate revenue to help fund intrastate calls and which has remained (in the present case) in place for over a decade. Indeed, we see the FNPRM as an opportunity to greatly clarify the

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[44] TRS Declaratory Ruling at ¶ 1.

[45] *Id.*

[46] O'Rielly Statement.

[47] 47 U.S.C. §225(b)(1).

[48] 47 U.S.C. §225(b)(2).

true meaning of the term "generally" as it is used in 47 U.S.C. §225(d)(3)(B) and we assert that such clarification would eliminate the concern expressed by Commissioner O'Rielly.

As to how others might seek to expand such a ruling, we believe the concern that others will seek to take reasoning or policies set in this proceeding and seek to apply them to other proceedings presents little cause for concern. What relay services are and how they are regulated and funded flows from the language contained within 47 U.S.C. §225 and we believe the Commission has sufficiently demonstrated throughout the FNPRM that the actions it seeks are specific to relay services and should not be taken as having broader application. As IDT has long argued, relay services are neither fish nor fowl and need to be examined within the strict confines of their statutory basis. Accordingly, we urge the Commission to explicitly anchor its findings in this proceeding within the language of 47 U.S.C. §225 and make it clear that any findings issued and/or actions taken in this proceeding should not and cannot be expanded beyond Section 225's unique statutory construction.

Commissioner O'Rielly continued, "Instead, we can get to the same outcome under my approach and avoid really problematic lines of thinking in the process."[49] It is not clear to IDT what approach the Commissioner proposed to assess intrastate providers as we read his Statement primarily as a means to address IP CTS costs (rather than contributions to the Fund) but, as a general matter, IDT does not oppose any lawful approach that expands the IP CTS contribution base to include intrastate revenue.

Finally, Commissioner O'Rielly stated "I am also extremely troubled by the options for implementing such an expansion. I recently wrote in a blogpost that the notion of jurisdictional separations is increasingly anachronistic in an IP driven app economy. The universe of providers subject to this type of legacy accounting has been shrinking fast, and with the Commission's full blessing. I am leery of giving it new life in this proceeding. I hope that, as the service continues to evolve, this legacy approach will be overtaken by events and the Commission will reconsider its thinking."[50] IDT agrees that going down the path of jurisdictional separations is unwise and, as noted *supra*, completely unnecessary as §225(d)(3)(B) refers to cost recovery "from subscribers." Common carrier contributors to the existing Fund and the proposed IP CTS Fund *are not "subscribers."* Therefore, this subsection does not apply to cost recovery from common carrier contributors to the Fund(s): it applies to the recovery of costs for relay services imposed by those common carrier contributors to end-user subscribers. Yet even if the Commission declines to accept IDT's position, we note that the Commission has proposed a single-factor contribution methodology that does not compel jurisdictional separations and it is this methodology that IDT supports. But if the Commission were to conclude that it is compelled to

[49] O'Rielly Statement.

[50] *Id.*

send this matter to the Joint Board and impose jurisdictional separations, IDT supports the imposition of a temporary methodology (not unlike the temporary approach this Commission implemented when expanding the Fund to include the IP-based services) and implement a jurisdictional separations-based methodology at a later date.

H. THE COMMISSION'S ORDER SHOULD ADDRESS THE TRS FUND PAYMENT RESERVE AND HOW IT WILL WORK IF/WHEN A SEPARATE IP CTS FUND IS CREATED

IDT raises one additional point which the NPRM only tangentially addresses - namely, the treatment of the Fund Payment Reserve if/when the Commission adopts the first of its proposed methodologies ("comput[ing] a single contribution factor for IP CTS, which would be applied in the same manner to all end-user revenues, both interstate and intrastate, in effect treating the IP CTS revenue requirement as a single pool to which all TRS Fund contributors would pay the same percentage of their total end-user revenues.")[51] IDT requests that the Commission clarify how, in the first year of this new IP CTS Fund and thereafter, the Payment Reserve (for both the remaining TRS Fund and the new IP CTS Fund) would be calculated. It is the position of IDT that because the Payment Reserve is meant to recover two months of each covered relay service, it would be simple to "pull out" of the current Fund the two months associated with IP CTS and insert those two months' costs into a Payment Reserve for the newly-created IP CTS Fund.

Regarding the remaining costs contained within the "Non-Provider" component of the (present) TRS Fund budget, IDT believes that because Congress did not address how or whether the Commission could apportion management costs amongst multiple services and then recover those costs, the Commission has discretion regarding its apportionment of such costs between the remaining TRS Fund and the new IP CTS Fund. IDT notes that the Commission could apportion costs based on any of several factors – including but not limited to proxies such as comparable budgets or number of minutes per fund. IDT finds it unlikely to take issue with any just and reasonable outcome and raises this issue within its comments primarily to ensure that the issue is addressed in a subsequent Order.

[51] FNPRM at ¶ 106.

III. CONCLUSION

For the reasons stated herein, IDT affirms its support for the Commission's proposal to replace the current temporary funding contribution methodology for IP CTS with a permanent single contribution factor methodology that would expand the contribution base to include intrastate revenue. IDT urges the Commission to implement its proposal immediately.

Respectfully submitted,

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